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881417—59

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 507

RICHARD A. MACK AND THURMAN A. WHITESIDE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* memorandum of the court of appeals (Pet. App. 3a–5a) is not yet reported.

JURISDICTION

The order docketing and dismissing the appeals was entered on September 29, 1959. A petition for rehearing *en banc* was denied on October 22, 1959. The petition for a writ of certiorari was filed on October 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial of a motion for judgment of acquittal after a mistrial is appealable.

STATUTE AND RULE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 29 of the Federal Rules of Criminal Procedure provides:

> (a) Motion for Judgment of Acquittal.
>
> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> (b) Reservation of Decision on Motion.
>
> If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion

is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

STATEMENT

Petitioners were tried upon an indictment charging a violation of 18 U.S.C. 1505 (Influencing or Injuring Witness Before Agencies and Committees) and 18 U.S.C. 371 (Conspiracy) (see Prelim. Supp. Orig. Rec. 4–16).[1] At the close of all the evidence each petitioner moved for judgment of acquittal (Tr. Vol. 52, pp. 6300, 6307). The trial judge reserved decision pursuant to Rule 29 of the Federal Rules of Criminal Procedure, and submitted the case to the jury (Tr. 6330). When the jury was unable to agree on a verdict the court declared a mistrial and set the case for reassignment (Prelim. Supp. Orig. Rec. 3). The court thereafter entered an order denying the motions for judgment of acquittal (Prelim. Supp. Orig. Rec. 2).

[1] There has been filed with the Clerk a copy of the transcript, which will be referred to as "Tr.". All the original district court pleadings and orders are separately bound in two volumes entitled "Original Record on Appeal," and are supplemented by a certified volume entitled "Preliminary Supplemental Original Record on Appeal." Also filed and certified are two separately paginated volumes containing only those items designated by petitioners Mack and Whiteside, respectively. The Mack designation will be referred to as "M." and the Whiteside designation as "W.".

Petitioners filed notices of appeal from this order. The government moved to docket and to dismiss, on the ground that the order was not appealable (M. 1–4, W. 1–4). The court of appeals, in a *per curiam* memorandum, dismissed the appeals (M. 38–41, W. 48–51).[2] It held (Pet. App. 5a) that "the denials of the motions for judgments of acquittal were not final decisions within the meaning of the statute [28 U.S.C. 1291]" governing criminal appeals. The court stated (Pet. App. 4a) that it "agree[d] with * * * and adopt[ed]" the opinion of the Court of Appeals for the Fifth Circuit in *Gilmore* v. *United States,* 264 F. 2d 44, certiorari denied, 359 U.S. 994, rehearing denied, 360 U.S. 914 (M. 40, W. 50). The court below unanimously denied rehearing *en banc* (M. 62, W. 72).

ARGUMENT

Petitioners present only the narrow question whether an order denying a motion for judgment of acquittal, entered after the jury has failed to agree, is appealable. This precise issue was, as petitioners recognize (Pet. 4), decided adversely to their contention in *Gilmore* v. *United States,* 264 F. 2d 44 (C.A. 5), in which this Court recently denied certiorari. 359 U.S. 994. The court below in the instant case "agree[d] with * * * and adopt[ed]" (Pet. App. 4a) the opinion in the *Gilmore* case, and there is no greater reason for further review here

[2] The court below also dismissed appeals from another order which denied motions for acquittal based on different grounds. No review is sought of that ruling.

than in *Gilmore*.[3] See, also, *United States* v. *Swidler*, 207 F. 2d 47 (C.A. 3), certiorari denied, 346 U.S. 915, where the Third Circuit, sitting *en banc*, held that an order of the trial court, entered after a guilty verdict, which denied a motion for acquittal but granted a new trial, was not appealable. The court there assumed *arguendo* that the evidence was insufficient to prove guilt and that an acquittal should have been directed, but nevertheless concluded that the order denying the acquittal was not "a final reviewable decision" (p. 48).

An order denying a motion for acquittal is not a reviewable "final decision" because "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212. For unless a defendant has been convicted and sentenced, the denial of an acquittal is merely an interlocutory step in the proceedings. As in the case of other interlocutory orders, it may be challenged only on appeal from the "final decision," that is, on appeal from any conviction and sentence. Cf. *Parr* v. *United States*, 351 U.S. 513, where this Court held that dismissal of an indictment in one district,

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[3] Petitioners' argument (Pet. 4–5) that a retrial in the instant case will subject them to a greater burden than was imposed by the retrial in *Gilmore* (because of the greater length of the trial and the defendants' distance from their homes) is beside the point. For the rationale of *Gilmore*—and of the decision below—is that an order denying acquittal is not appealable because it is not a "final decision"; and the extent of the burden which a retrial might impose upon a defendant cannot change the finality of the order.

after the Government had obtained a new indictment in another district for the same offense, was not appealable, since it was merely an interlocutory step in the criminal case.[4]

The *Parr* case also answers petitioners' contention (Pet. 8–13) that denial of a motion for judgment of acquittal is so severable from the main controversy as to be reviewable under the rule of such cases as *Stack* v. *Boyle*, 342 U.S. 1. This Court pointed out in *Parr* (351 U.S. at 519) that in such cases "orders made during the course of a litigation were held appealable because they related to matters outside the stream of the main action and would not be subject to effective review as part of the final judgment in the action. Unlike the orders in those cases, this order was but a 'step toward final disposition of the merits of the case' and will 'be merged in the final judgment'". Similarly, in the instant case the denial of acquittal was but a "step toward final disposition of the merits of the case." Petitioners have already filed a claim of double jeopardy in connection with the retrial, and if that claim is rejected, its validity may be tested on appeal from any final judg-

[4] Indeed, this is an even stronger case than *Parr* for holding the interlocutory order not separately reviewable. For in *Parr* the challenged indictment was dismissed, and the defendant was reindicted in another district. In the instant case, however, the retrial will be on the same indictment and in the same district.

ment of conviction and sentence entered against them.[5]

Petitioners argue (Pet. 10–11), however, that if they were entitled to a judgment of acquittal in the first case, their subsequent retrial would itself violate their constitutional protection against double jeopardy. But the fact that a constitutional right is claimed does not make a non-final order final. Constitutional rights may be involved in a ruling on a motion to suppress evidence, but this Court has expressly held that such rulings are not appealable before final judgment. *Cogen* v. *United States*, 278 U.S. 221; *Cobbledick* v. *United States*, 309 U.S. 323, 325–326; *Carroll* v. *United States*, 354 U.S. 394, 404.

As we pointed out in our brief in opposition in the *Gilmore* case (No. 683 Misc., Oct. Term. 1958), permitting immediate review of orders denying motions for acquittal would lead to serious and unwarranted

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[5] Petitioners suggest (Pet. 7–8) that although the Government stated in its brief in opposition in *Gilmore* that the denial of acquittal in the first trial could be litigated on appeal from conviction in the second trial, it took a contrary position in the instant case in the court of appeals because it stated that the order of acquittal had become moot as a result of the mistrial. But the mootness contention was made only with respect to the appealability of the order denying the motion for acquittal. We do not deny that, if petitioners are convicted and sentenced at the retrial, they may on appeal therefrom have review of any claim of double jeopardy.

delay in the conduct of criminal proceedings. For under such a rule, whenever the jury disagreed, a defendant who made a timely motion for acquittal could obtain an immediate review of the sufficiency of the evidence that had been offered against him, even though he had not been convicted and sentenced, and even though, upon the retrial, he might be acquitted. Such a procedure would be contrary to "the long-standing statutory policy against piecemeal appeals" (*Parr* v. *United States, supra*, 351 U.S. at 519). Indeed, in this very case, petitioners' attempt to obtain review of the interlocutory denial of acquittal has resulted in delay in the retrial. On November 12, 1959, the trial date previously set, the district court postponed the trial until this petition has been determined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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